LIBRARY
SUPREME COURT, U. S.
JUN 6 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 164

IRVEN LEE DAWKINS and CAROL W. THOMAS,

Petitioners,

—VS.—

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AND THE SUPREME COURT OF FLORIDA

MURRAY A. GORDON
401 Broadway
New York, New York

JEROME J. BORNSTEIN
125 S. Court Avenue
Orlando, Florida

Attorneys for Petitioners

INDEX

	PAGE
Opinions Below	2
Jurisdictional Grounds	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	4
REASONS FOR GRANTING THE WRIT	
I. The convictions were in violation of the First Amendment	16
II. The convictions were unconstitutional under the due process clause of the Fourteenth Amendment	24
III. It was violative of due process for the Florida appellate courts to sustain the convictions here on the basis of evidence adduced after the convictions	26
CONCLUSION	27
APPENDIX	
Opinion of the District Court of Appeal of Florida, First District	29
Judgment and Sentence	38
Order Dismissing Appeal	40
Order Denying Certiorari	41

Table of Authorities

PAGE

Cases:

Bloom v. Illinois, 36 U. S. L. W. 4429 17
Bridges v. California, 314 U. S. 252 ..... 16, 17, 18, 20, 21, 22

Chessman v. Teets, 356 U. S. 156 27
Cole v. Arkansas, 333 U. S. 196 24
Craig v. Harney, 331 U. S. 367 ..... 17, 20, 21, 22
Craig v. Hecht, 263 U. S. 255 ..... 17, 22

De Jonge v. Oregon, 299 U. S. 353 24
Dombrowski v. Pfister, 380 U. S. 479 18

Garner v. Louisiana, 368 U. S. 157 25

New York Times Co. v. Sullivan, 376 U. S. 254 20
Nye v. United States, 313 U. S. 33 17

Pennekamp v. Florida, 328 U. S. 331 ..... 16, 17, 21, 23

Shuttlesworth v. Birmingham, 382 U. S. 87 25

Taylor v. Louisiana, 370 U. S. 154 25
Thompson v. City of Louisville, 362 U. S. 199 25
Toledo Newspaper Co. v. United States, 247 U. S. 402 .. 20

Wood v. Georgia, 370 U. S. 375 ..... 17, 18, 19, 21

Younghans v. State, 90 So. 2d 308 9

United States Constitution:

First Amendment 2, 3, 16, 18, 21, 23
Fourteenth Amendment 2, 13, 16, 24

PAGE

Statutes and Rules:

28 U.S.C. §1257(3) 2

28 U.S.C. §2101(e) 2

Rules of the United States Supreme Court:

Rule 19(1)(a) 2

Rule 22(1) 2

Miscellaneous:

De Mott, "The Age of Overkill", The New York Times Magazine, May 19, 1968, p. 104 20

The Report of the President's National Advisory Commission on Civil Disorders 20-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

IRVEN LEE DAWKINS and CAROL W. THOMAS,

Petitioners,

—VS.—

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AND THE SUPREME COURT OF FLORIDA

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Irven Lee Dawkins and Carol W. Thomas, respectfully pray for a writ of certiorari to the District Court of Appeal of Florida, First District, to review the decision of that Court affirming a judgment and sentence by the Circuit Court of Florida, Eighth Judicial District, Alachua County, adjudging the petitioners guilty of contempt and imposing sentences of six months and four months, respectively, on petitioners, and for a writ of certiorari to the Supreme Court of Florida to review the orders of that Court dismissing petitioners' appeal from the aforesaid decision of the aforesaid District Court and denying petitioners' application for a writ of certiorari.

Opinions Below

The opinion of the District Court of Appeal of Florida, First District, is reported as *Dawkins, et al.* v. *State of Florida,* at 208 So. 2d 119, and is set out in the Appendix, *infra,* pp. 29-37.

Jurisdictional Grounds

The opinion of the District Court of Appeal of Florida, First District, is dated and filed March 7, 1968 (R-94)[1] and the order of that court is dated and filed May 14, 1968 (R-108). The order of the Florida Supreme Court dismissing the appeal is dated and filed April 17, 1968 (RFS-1), and the order of that court denying the petition for a writ of certiorari is dated and filed April 23, 1968 (RFS-2).

The jurisdiction of this Court is invoked pursuant to 28 USC 1257 (3); 28 USC 2101 (e); and Rules 19(1)(a) and 22(1) of the Rules of the United States Supreme Court.

Questions Presented

Whether contempt convictions of the petitioners for the publication and dissemination of an article which dealt with a pending state Grand Jury investigation and which was read by members of that Grand Jury:

(1) violated the First Amendment, as incorporated by the Fourteenth Amendment, where there was no sufficient showing of a clear and present danger that the article

[1] The letter "R" refers to the records transmitted from the District Court of Appeal, First District of Florida. The letters "RFS" refer to the record transmitted from the Supreme Court of Florida.

would or did obstruct, impede, or interfere with the work of the Grand Jury;

(2) violated the Due Process Clause of the Fourteenth Amendment where the charges were that the article held the Circuit Court and Grand Jury of Alachua County, Florida, up to ridicule and impugned the impartiality of that Court and Grand Jury, but the convictions were based upon alleged intentional interference with the work of the Grand Jurors resulting from their reading of the publication;

(3) violated the Due Process Clause of the Fourteenth Amendment where there was no evidence that either of the petitioners had disseminated the article or caused the article to be disseminated to any member of the Grand Jury; or

(4) violated the Due Process Clause of the Fourteenth Amendment where the conviction was sustained on appeal on the basis of testimony adduced at a post-conviction hearing held for the purpose of determining the propriety of denying bail pending appeal.

Constitutional Provisions Involved

1. United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. United States Constitution, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Statement of the Case

In 1967 the petitioners complained publicly that Negro female inmates of the Gainesville, Florida, City Jail were being sexually molested by certain officials. The Alachua County, Florida, Grand Jury was reconvened on December 11, 1967 to investigate these charges. The contempt conviction here under review resulted from the writing and dissemination of an article dealing with those Grand Jury proceedings.

The contempt proceedings were commenced on December 18, 1967 by the petitions of the State Attorney of the Eighth Judicial Circuit of Florida, Alachua County, addressed to the Circuit Court for that Circuit (R-3, 5). Irven Lee Dawkins and Carol W. Thomas (herein sometimes referred to as "the petitioners") are charged with being the author and co-author, respectively,[2] and with disseminating or causing to be disseminated "in this community" a publication entitled "Black Voices" which "held this Court and Grand Jury system up to ridicule" and "impugned the impartiality of this Court and the present Grand Jury" (R-3, 5). The following language from that publication is quoted in the petitions:

> "The so-called authorities of Gainesville are at their old trick again. They have called together a Grand-Jury to investigate charges made by Black people against that racist, Klan-infested police department. Well, gather round, let me tell you this; that Grand-Jury is just as racist and Klan infested as the police de-

[2] The text of the publication lists Dawkins as the author (see (R-91), attached publication), but the parties have stipulated Mrs. Thomas as co-author (R-18).

partment is. I told you before that when they got through lying, fixing, framing, and denying—*nothing* was going to be done! Look who's sitting on the jury. What they will probably do is put in a couple of Uncle Toms to make their findings justifiable. If there are any Uncle Toms on that Grand-Jury, we all know who they will be.

By them housing female prisoners in the County jail is not going to solve the issue; just one of them. In the meantime that sadist Wildersān gets off scott-free. And Ted Duncan—I don't have to tell you about that negro-hating hunkie, I think you already know. And ex-mayor McKinney—he's worse. A lying, no-good, racist if I ever saw one. He reminds me of 'Bull' Conner.

There are people who are going to be subpoened to come to this fixed Grand-Jury, including myself. Many people are afraid to go—which shows WHITE POWER again. WE ARE ASKING THAT EVERYONE IN GAINESVILLE WHO IS MAN AND WOMAN ENOUGH TO STAND UP AND FIGHT AGAINST THIS OPPRESSIVE CITY AND COUNTY GOVERNMENT COME FORWARD AND TESTIFY ON MONDAY, DEC. 18 AT 9:30 A. M. By the way, where are those so-called negro-leaders in Gainesville. You know these things have been going on, but you are afraid to stand up. So stay in your chairs, we know you are a part of White oppression" (R-3, 4).

No evidence in support of the petitions was cited other than the quoted language.

By Orders to Show Cause dated December 19 and 20, 1967, Circuit Judge James C. Adkins, Jr., directed the

Alachua County Sheriff to take petitioners into custody and to produce them on the December 27 return date, then to show cause why they should not be adjudged in contempt, and conditioned release on $1,500 bond in the case of Mr. Dawkins and $500 for Mrs. Thomas (R-7, 9). Motions by petitioners to quash the Orders to Show Cause on the factual, statutory, and state and federal constitutional grounds presented in this petition (R-10, 12) were denied by an order which also consolidated the proceedings (R-14). The petitioners thereupon interposed an answer admitting certain stipulated matters and denying that the article was contumacious of the Court or the Grand Jury (R-15).

In lieu of a trial of the issues thus posed by the pleadings, counsel entered into a stipulation as to "the facts . . . to which witnesses for the State would testify" (R-17). The substance of the stipulation was as follows:

> "1. That a Grand Jury for Alachua County, Florida, was empaneled on the Fall Term of Court on October 9, 1967; that said Grand Jury was composed of five Negroes and thirteen Whites; that the term of said Grand Jury continues until the Spring Term of Court beginning in April, 1968.
>
> 2. That the authors of the publication 'Black Voices', and in particular the portion of said publication quoted in the Affidavit and Petition for Rule to Show Cause, were the Respondents herein.
>
> 3. That on the 11th day of December, 1967, T. E. Duncan, as State Attorney aforesaid, moved the Court to reconvene said Grand Jury and on December 11, 1967, James C. Adkins, Jr., Circuit Judge, entered an Order reconvening said Grand Jury on December 18, 1967, at 9:30 a. m.

4. That said Grand Jury reconvened and went into session beginning at 9:30 a. m. December 18, 1967, in the Court House in Gainesville, Alachua County, Florida.

5. That while said Grand Jury was in session or during a recess of said Grand Jury the respondent, Irven Lee Dawkins, also known as Jack Dawkins, distributed four copies of the publication 'Black Voices', containing the language quoted in the Affidavit and Petition for Rule to Show Cause, to four persons in the hallway adjacent to said Grand Jury room.

6. That in addition to the dissemination or the distribution of the copies mentioned in the preceding paragraph other copies of the publication 'Black Voices', containing the language quoted in the Affidavit and Petition for Rule to Show Cause, were distributed by the Respondents elsewhere in the City of Gainesville.

7. It is further stipulated by and between counsel for the respective parties that a copy of the entire publication 'Black Voices' herein referred to is attached to this Stipulation and made a part hereof." (R-17, 18).

Based on the foregoing record, and without any other or further proceedings, on December 27, 1967 Circuit Judge Adkins found both petitioners guilty of contempt and forthwith sentenced petitioners to the County Jail of Alachua County for six months and four months respectively (R-19). In his supporting opinion, Circuit Judge Adkins stated:

"I consider this publication in itself to be a calculated effort on the part of the respondent to interfere with

the fair administration of justice, and this being so it would not be necessary to show that it did actually influence the grand jury in any report which may be made." (R-20)

• • • • •

". . . the publication was distributed in the court house and from that it may easily follow that this publication was accessible to witnesses who were to appear before the grand jury, with the possibility of influencing the testimony to be given and also the possibility or natural inference that the publication may come into the hands of a member of the grand jury." (R-21)

• • • • •

". . . the reference in the publication that 'if there are any Uncle Toms on that grand jury we all know who they will be' constitutes a veiled threat to the members of the grand jury who are of the colored race." (R-21)

• • • • •

". . . the reference to a 'racist and Klan-infested grand jury' would tend to antagonize members of the grand jury." (R-22)

Petitioners appealed immediately to the District Court of Appeal, First District, of Florida (R-26), assigning as error that the action of the Circuit Judge was contrary to the evidence and the law (R-28). Simultaneously petitioners instituted proceedings for bail pending appeal. These bail proceedings are not part of the record here, but we shall review them briefly because they resulted in a significant expansion, during the pendency of the foregoing appeal, of the record before this Court.

Circuit Judge Adkins, while expressly acknowledging "that the denial of the motion may result in the completion of the sentence prior to disposition of appeal", denied bail by order dated December 27. The motion by petitioners to the Florida District Court of Appeal, First District, to review denial of bail pending appeal was refused by order of that court, filed on January 10, 1968, after a discussion on the merits wherein it was concluded that the appeal did not meet the Florida test of raising "grounds not frivolous but fairly debatable" (*Younghans* v. *State,* 90 So. 2d 308). Petitioners thereupon applied for habeas corpus to the United States District Court for the Northern District of Florida and, by its order of January 15, 1968, that court denied the application without prejudice, and found that any delay beyond five days by an appropriate state court in releasing petitioners after application to such court by petitioners "will render state corrective process ineffective to protect the rights of such petitioners" and would be the occasion for a hearing on the merits by the United States District Court. On January 16, 1968 the Florida Supreme Court denied petitioners' application for a writ of habeas corpus, one judge dissenting, and on that same day petitioners prayed for a hearing on the merits before the United States District Court. On January 17, 1968 Chief United States District Judge Carswell disposed of this motion (R-92A) by directing a hearing before the Circuit Court for Alachua County, Florida, "for establishment on the record of such facts as there may be . . . to support the order of that Court denying these petitioners bail pending appeal" (R-92C), setting January 22, 1968 as the outside date for the transcribing and filing of the record of such hearing, and fixing bail at $500 if the foregoing conditions were not met.

On January 19, 1968, commencing 4:00 P.M. and ending 6:45 P.M., the directed hearing was held before Circuit Judge Adkins (R-32). In part, that hearing dealt with conventional bail matters, *i.e.*, the character and reputation of petitioners and the likelihood of their compliance with directions of the court. But in major part the hearing dealt, over objections by petitioners' counsel (R-39, 50, 61, 66, 67, 73, 78, 79), with the issue whether the publication and dissemination of the article in question had interfered with or impaired the Grand Jury proceedings. The State moved to amend the record in the pending state court appeal to include the latter testimony bearing on the merits of the charged contempt (R-30), and that motion was granted (R-93).

Petitioners here contend that it is improper to appraise the correctness of the original judgment of, and sentence for, contempt on the basis of testimony adduced after the rendition of such judgment and sentence. For the sake of completeness, however, we shall review the January 19th evidence.

The foreman of the Grand Jury involved testified that on December 18, 1967 the Grand Jury was investigating complaints made to the Gainesville City Commission by the petitioners (R-40, 41). At that time the "Black Voices" publication "came to" his attention during a midmorning recess (R-41).

> ". . . I saw one of the Grand Jurors with it. During that time, we kept passing it around among ourselves. I did not see it come into the courtroom. I don't know how it got in here." (R-41)

When asked for his "immediate reaction" to the article, the foreman testified:

"A. I was startled, because it intimidated me. I felt it was a threat to me as a Grand Juror, when we had hardly even opened the session. It frightened me, frankly.

Q. Did you, Mr. Mitchell, consider whether or not it was an attempt upon you as a Grand Juror to force you to reach some findings or decision whether or not there was any evidence to support it?

Mr. Bornstein: Your Honor, I object. That is a leading question.

The Court: I will overrule the objection.

A. Yes." (R-42, 43)

* * * * *

"Q. Mr. Mitchell, did you feel that the publication had any effect upon your ability to make an unbiased determination of the issues that were to be determined by you?

Mr. Russ: He is leading the witness, Judge. He is asking his witness what his impressions were.

The Court: Your objection is because it is leading?

Mr. Russ: Yes, sir.

The Court: I will overrule the objection.

Mr. Duncan: Please read the question.

(Thereupon, the question was read by the Court Reporter.)

Mr. Russ: I further object, Your Honor. Again, he is referring to a mental process.

The Court: The objection is overruled.

A. Yes, sir; it did.

Q. Can you explain how? A. Well,—

The Court: Go ahead.

A. The details of which I cannot reveal because of the Oath that I took as a Grand Juror, it affected the deliberations—

Mr. Russ: Your Honor, I object to this as being a pure conclusion on the part of this man. He can speak for himself, but surely he can't speak for the other 17 members of the Grand Jury.

The Court: I am going to sustain the objection to that.

A. It affected me. It affected the way in which I operated as a Grand Juror throughout the entire case. It affected the final Presentment, as far as I was concerned, and the Presentment which I voted for." (R-45-46)

On cross-examination the foreman of the Grand Jury acknowledged that the Grand Jury had, as the "Black Voices" article predicted, found as "not true" the charges by the petitioners of the sexual molestation of Negro women prisoners by jail officials (R-47).

The balance of the testimony as to the alleged contempt was from six other members of the Grand Jury and similar in import to that of the foreman. None testified how the publication had come into the possession of the Grand Jury and none testified that he received the publication directly or indirectly from either petitioner (R-51-52, 62, 67, 74). The effects of the reading of the article were described by these witnesses as follows:

"A. It upset me when I first read it, and to feel like that here I was, a Grand Jury member not known, or not knowing, the witnesses—

Mr. Russ: Your Honor, I will object to the answer to the question, 'It upset me.'

The Court: The objection is overruled.

A. Well, first, they didn't know me, and yet they were accusing me first of being a liar and of being fixed." (R-53-54)[3]

* * * * *

"A. . . . I recall reading this and I read it the second time because I didn't like the tone of it at all. And after reading it the second time, I felt that this was an insult to me, personally, and that I had never met Mr. Dawkins or Mrs. Thomas to my knowledge and I didn't feel that they had ever met me, and yet they were saying things about me that I resented. And I took this more or less as a threat that I should try and find things in their favor in regards to the hearing even to the extent that the evidence would be there or would not be there. I did my best to try and judge the hearing without trying to consider this, but I know it was always on my mind." (R-62-63)

* * * * *

"A. Well, it concerned me somewhat and it is difficult to really figure out what was trying to be accomplished. I felt like to some extent I was being put on notice. I didn't know who the writer was and I don't know if the

[3] When this witness was asked how publication had affected his deliberations, he refused to answer, saying:

"A. I feel I would be violating my Oath as a Grand Juror.
Q. Haven't you done that already, sir? A. No, I haven't." (R-59)

writer knew me, so some of the charges made in there I couldn't understand the foundation for the charges. But I was concerned about it." (R-67)[4]

• • • • •

". . . it seemed like to me it was a small way of threat. Of course, I didn't pay too much attention to it. I don't know how much effect it taken. That's just the way I felt about it at the time." (R-74)

• • • • •

"Well, sir, at best it had an effect to where the findings that I came to as a member of the Grand Jury would not be acceptable to the people involved and the people named there; that no matter how long it took us to make our findings it wouldn't be satisfactory. It caused anger for me, as a result—to me, personally. And it caused me to reflect very long on the wording of the final statement made by the Grand Jury.

---

[4] On cross-examination this witness further testified:

"Q. You said that it would force you—you thought it might force you to make findings that were contrary to the evidence. A. No, I didn't say that. I said that it would make me believe that what we did come up with if it happened to be contrary to the authors' opinions then I would be characterized as such men.

Q. As what? A. Klan-infested, lying, member of the Klan, lying. There was another term in there—I'm just trying to think what it was." (R-70)

"Q. There was nothing in this article in that flier that in any way changed your evaluation of the evidence, was there? A. There was a little bit of concern, myself, as to the wording of the charges." (R-71)

"Q. Let me rephrase the question. The question is: isn't it true that when you reached your findings as contained in the Presentment that this flier in no way affected what your findings were? You didn't violate your Oath as a Juror in seeking the truth based upon this flier, did you? A. I don't believe so." (R-71)

Q. Can you state whether or not you considered that a threat or an intimidation to cause you to make a finding regardless of the evidence?

Mr. Russ: Objected to as leading.

The Court: Objection overruled.

A. State the question again.

Mr. Duncan: Please read him the question.

Q. (Question read by reporter) A. No, sir." (R-79, 80)

• • • • •

"... it was an insult to me, as well as a kind of veiled threat that if we did not find to suit them that they knew who we were and implied that things may happen." (R-86)

All admitted that the publication did not deter the Grand Jury from concluding, in its presentment, that the charges being investigated were not substantiated[5] (R-58, 65, 71, 76, 87).

On March 7, 1968 the District Court of Appeal First District, State of Florida, affirmed the contempt conviction of petitioners (R-94; App. *infra*, pp. 38-39). That court's opinion relied heavily upon the described testimony at the January 19th hearing (R-98-100, 101; App., *infra*, pp. 29-37) and concluded that a showing had been made of a clear and present danger of interference with the Grand Jury suffi-

[5] The transcript of the described hearing was remitted to the United States District Court which denied habeas corpus on January 24, 1968 after reviewing the record, but on February 6, 1968 the United States Court of Appeals for the Fifth Circuit granted $1,000 bail pending appeal from the habeas corpus denial.

cient to overcome the petitioners' First Amendment rights to write and distribute the publication involved.*

Petitioners sought review in the Florida Supreme Court by way of appeal (R-104) and certiorari (RFS-2). Petitioners assigned as error the order supplementing the record to include the January 19th hearing and the order of affirmance by the Florida District Court of Appeals, First District, as contrary to the evidence and to the law (R-105). The Florida Supreme Court dismissed the appeal on April 15, 1968 (RFS-1; App., *infra*, p. 40) and denied certiorari on April 23, 1968 (RFS-2; App., *infra*, p. 41).

REASONS FOR GRANTING THE WRIT

I.

The convictions were in violation of the First Amendment.

Where, as here, a publication and its dissemination are charged as in contempt of a pending state judicial proceeding, the prohibitions of the First Amendment, as incorporated in the Due Process Clause of the Fourteenth Amendment, are applicable. *Bridges* v. *California*, 314 U. S. 252 (hereinafter referred to as *"Bridges"*); *Pennekamp* v. *Florida*, 328 U. S. 331 (hereinafter referred to as *"Penne-*

* On April 12, 1968, following the described affirmance by the Florida District Court of Appeal, the United States Court of Appeals for the Fifth Circuit held that the petitioners' "appeal to the Florida appellate courts was not so lacking in merit or frivolous as to warrant denial of bail pending appeal", and, accordingly, reversed the United States District Court's order denying habeas corpus and granted $1,000 bail for each petitioner pending exhaustion of "such remedies and appellate procedures as are available" to petitioners.

kamp"); *Craig* v. *Harney*, 331 U. S. 367 (hereinafter referred to as "*Harney*"). In such circumstances conviction for contempt cannot be justified merely by a showing of "a tendency to prevent and obstruct the discharge of judicial duty". See *Nye* v. *United States*, 313 U. S. 33, 47-52; *Craig* v. *Hecht*, 263 U. S. 255, 277; *Bloom* v. *Illinois*, 36 U. S. L. W. 4429, 4432. Instead there is required a "solidity of evidence" (*Pennekamp*, at 347-348) that, pursuant to the clear and present danger test, "the substantive evil of obstruction or interference must be extremely serious and the degree of imminence extremely high before utterances can be punished" (*Bridges*, at 263; see also *Pennekamp*, at 334; *Harney*, at 371-373). And it is well settled that the ultimate issue whether an utterance does "carry a threat of clear and present danger to the impartiality and good order of the courts" must be independently determined by this Court. *Pennekamp*, at 335; *Harney*, at 373-374; *Wood* v. *Georgia*, 370 U. S. 375, 386 (hereinafter referred to as "*Wood*").

Each of the principles cited is applicable where the judicial proceeding involved is that of a Grand Jury investigation. *Wood*, at 389-393. Chief Justice Warren has observed:

> "Particularly in matters of local political corruption and investigation it is important that freedom of communication be kept open and that the real issues not become obscured to the grand jury. It cannot operate in a vacuum." *Wood*, at 390.

> "When the grand jury is performing its investigatory function into a general problem area, without specific regard to indicting a particular individual, society's interest is best served by a thorough and extensive

investigation, and a greater degree of disinterestedness and impartiality is assured by allowing free expression of contrary opinion. Consistent suppression of discussion likely to affect pending investigations would mean that some continuing public grievances could never be discussed at all, or at least not at the moment when public discussion is most needed." *Wood,* at 392.

The "chilling effect" doctrine of *Dombrowski* v. *Pfister,* 380 U. S. 479, has particular pertinency to discussion said to constitute contempt of a Grand Jury investigation, as here, into a timely and controversial matter of general and political concern. Such discussion, normally subsumed under the First Amendment, will subside precisely to the extent it runs the risk of criminality. *Wood,* at 392. And, as compared with the dampening effect of a statute with fixed and definite proscriptions, discussion of a pending Grand Jury investigation is carried on at the peril that any language may be found by a judge as obstructive of justice unless the full safeguards of the First Amendment are extended to such language. *Bridges,* at 269.

Measured by the described standards, the publication here complained of cannot, compatible with the First Amendment, be the basis for convictions for contempt.

We believe that respondent will concede that the publication and dissemination of the article are a form of expression protected by, if they do not exceed the bounds of, the First Amendment. The Alachua County Grand Jury was investigating charges, of lurid police activity, which were matters of public knowledge and interest and, therefore, discussion. The charges were highly inflammatory,

involving as they did police brutality, sexual molestation, and racism, and any resultant discussion was extremely likely to be heated. Petitioners had initiated the charges and could be expected to be participants in such discussion. In the described context, petitioners' rhetoric was more a function of the issue than of their impropriety. If petitioners had any right under the First Amendment to discuss publicly the charges pending before the Grand Jury investigation,—and this Court held such discussion appropriate in *Wood*,—then it was almost unavoidable to do so meaningfully or effectively without impinging upon the sensibilities of some.

The portion of the article complained of consists of three paragraphs. These contain harsh but brief characterizations of the police, the Grand Jury, two named individuals whom the record does not identify, and an ex-Mayor. The police and Grand Jury are both said to be racist, and the authors express their expectation that police duplicity before the Grand Jury will result in no action by the Grand Jury. The article anticipates no independent Negroes but only "Uncle Toms" on the Grand Jury, cites the fear of "many people" to testify, and urges "EVERYONE IN GAINESVILLE WHO IS MAN AND WOMAN ENOUGH TO STAND UP AND FIGHT AGAINST THIS OPPRESSIVE CITY AND COUNTY GOVERNMENT COME FORWARD AND TESTIFY ON MONDAY, DEC. 18 AT 9:30 A.M." Not in any of its parts, nor in its entirety can the article be fairly considered as the kind of impelling document which would create clear and present danger of seriously impeding or influencing a Grand Jury made up of persons who have, presumably, been frequently exposed to the dialogue and action of our times.

We assume that it was not contempt to anticipate correctly, as the article did, that "*nothing* was going to be done" by the Grand Jury. *Cf.* Holmes, J., dissenting in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 422, at 424. We likewise assume that the only call for action contained in the article was not contempt since that call was for men and women to feel free to "come forward and testify".

Nor was it contempt to use "strong language, intemperate language, and * * * an unfair criticism". *Harney,* at 376. For ours is

> ". . . a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."
>
> *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270.

> ". . . it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."
>
> *Bridges;* at 270.

The most offensive aspects of the article are its characterization of the Grand Jury "as racist and Klan infested" and its reference to possible "Uncle Toms on that grand-jury". But verbal "overkill" is part of the current mode of rhetoric. De Mott, "The Age of Overkill", The New York Times Magazine, May 19, 1968, p. 104. The Report of the President's National Advisory Commission on Civil

Disorders talks of "white racism" in describing our urban crisis. In any event, "It is not enough that the judge's sensibilities are affected or that in some way he is brought generally into obloquy". *Pennekamp,* at 372.

Editorials and stories characterizing a judge's action as "arbitrary" and a "travesty on justice" were held not to be contempt in *Harney.* Even more vitriolic editorials, stories, and cartoons charging Florida Circuit Court judges with delays and excessive deference to technicalities on behalf of defendants in pending criminal cases were held protected under the First Amendment in *Pennekamp.* In *Wood* the defendant had charged the judge with a crude attempt to intimidate Negroes and to agitate for Negro votes and followed this with a letter circulated among the Grand Jurors asserting that the judge's instructions to them were false; this Court held these utterances not punishable as contempt because they were within the First Amendment. Underlying the described cases is the understanding that judges and grand jurors must be assumed to be men of reasonable character, firmness, and courage so that even intemperate and abusive extra-courtroom criticism is not likely to obstruct or interfere with them in the performance of their duties. *Bridges,* at 270, 273, 276; *Pennekamp,* at 348; *Harney,* at 375-376; *Wood,* at 382-387. The experience of the Grand Jury here, utterly unresponsive to the petitioners' charges, confirms such an assumption in that the Grand Jurors were plainly not influenced by the petitioners' article.

The article states that

> "If there are any Uncle Toms on that Grand-Jury, we all know who they will be."

As a "veiled threat" this statement is far less menacing than the assertion, which was held not to be contempt in *Bridges,* at 276 ff., that 12,000 union members did "not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board". Even if the quoted statement of the article created the prospect of future criticism or unpopularity, it is clear that the law of contempt is not made for the protection of those "who may be sensitive to the winds of public opinion". *Harney,* at 376; see also *Bridges,* at 273; Holmes, J., dissenting in *Craig* v. *Hecht, supra,* at 281. And to the extent that the petitioners have articulated rather than threatened likely future public response to Grand Jury inaction, they are not guilty of contempt since if the Grand Jurors were "not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have sidetracked the course of justice". *Bridges,* at 276.

The described effect of the language of the article is not rendered criminal by the reactions to that language claimed by some members of the Grand Jury. For reasons discussed below we believe the testimony of the Grand Jurors to be no proper part of the record here (see pp. 26-27 *infra*). In any event, the issue here must be decided in terms of reasonably anticipatible reactions to the article, not in terms of unique or exquisitely sensitive reactions. Comment on pending cases

> "may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage

or stability in the face of criticism which individual judges may possess . . ."

Pennekamp, at 348.

Moreover, the proof at the January 19th hearing falls far short of any firm or solid showing that the article seriously impeded or influenced the work of the Grand Jury. Even with the aid of leading and suggestive questioning, the Grand Jurors claimed little more than that they were "startled" (R-42), "upset" (R-53), subjected to "an insult" (R-63), "concerned" (R-67), exposed to "a small way of threat" (R-74), caused "anger" (R-79), the subject of "a kind of veiled threat" (R-86). But there was, apparently, no delay or other interference caused, and no Grand Juror claimed that his vote or action as a Grand Juror was significantly influenced by the article. Irritation, even anger, is not enough to sustain a conviction for contempt where, as here, the provocation is occasioned by a form of expression guaranteed by the First Amendment.

For the reasons indicated, the convictions here are counter to the First Amendment pursuant to its terms and its construction by this Court. At the least, the convictions raise substantial constitutional questions concerning the permissible scope of First Amendment expression about a pending Grand Jury investigation. In either aspect of the state of the law the petition here prayed for should be allowed.

II.

The convictions were unconstitutional under the due process clause of the Fourteenth Amendment.

The original charges were that an article was disseminated in the "community" by the petitioners which held "up to ridicule" and "impugned the impartiality" of the Circuit Court and Grand Jury (R-3, 5). No obstruction or other interference with the work of the Court or the Grand Jury was charged in the petitions initiating the proceeding. The convictions, however, were based upon the finding that the publication "was calculated and intended to interfere with the administration of justice" by the Grand Jury (R-19, 22), and not upon any finding that the Court or Grand Jury had been subjected to ridicule or had its impartiality impugned. In view of the cases discussed at pp. 16-23 *supra*, any charge of contempt by reason of ridicule or impugnment was obviously constitutionally defective where not accompanied by a charge of obstruction or interference; libel and contempt are, of course, different offenses. And where, as here, a defendant is charged with one offense but convicted of another, due process is violated. *De Jonge* v. *Oregon*, 299 U. S. 353, 362; *Cole* v. *Arkansas*, 333 U. S. 196, 201.

Even if we treat the charges as one of contempt for interference with the work of the Grand Jury, the convictions here are constitutionally void. For the theory on which petitioners were convicted, though not charged, was that the work of the Grand Jury was impeded by reason of the reading of the article by members of the Grand Jury. In this view of the cause for prosecution, the evidence must show not only petitioners' responsibility for

the publication of the article but also for its dissemination to the Grand Jury. Only if petitioners disseminated, or were responsible for disseminating the article to the Grand Jurors can petitioners be guilty for the consequences alleged to have followed upon the reading of the disseminated article. And in this case, unlike other contempt cases involving widely and publicly distributed newspapers, dissemination cannot be inferred from the mere fact of publication.

The petitions initiating the proceedings allege dissemination of the publication by petitioners "in this community", not specifically to the Grand Jury (R-4, 6). None of the Grand Jurors testified that either of the petitioners or anyone acting for or on behalf of either of the petitioners distributed the article to any Grand Juror (see p. 12 *supra*). And the stipulation entered into in lieu of testimony specified only that one of the petitioners, Dawkins, "distributed four copies of the publication . . . to four persons in the hallway adjacent to said Grand Jury room", and that both petitioners had distributed the publication "elsewhere in the City of Gainesville" (R-18). There is, therefore, no evidence that petitioners distributed, or caused or intended copies of the article to be distributed to any Grand Juror. In this respect, too, therefore the convictions are invalid. For convictions thus totally devoid of supporting evidence are violative of due process. *Thompson* v. *City of Louisville,* 362 U. S. 199; *Garner* v. *Louisiana,* 368 U. S. 157; *Taylor* v. *Louisiana,* 370 U. S. 154; *Shuttlesworth* v. *Birmingham,* 382 U. S. 87.

III.

It was violative of due process for the Florida appellate courts to sustain the convictions here on the basis of evidence adduced after the convictions.

As indicated in the statement of the case, the record was expanded by the Florida appellate courts to include testimony taken, after the convictions, to determine whether the denial of bail pending appeal was proper (see pp. 9-16 *supra*). In our view serious due process questions are raised, and should be resolved, where post-conviction hearings not addressed to issues of innocence or guilt are then used in subsequent appeals dealing with such issues. Sentencing, sanity, parole and other post-conviction hearings involve procedures, standards and burdens of proof, testimonial involvement by defendants otherwise entitled to the privilege against self-incrimination, and evidence by doctors, psychiatrists, probation officers, social workers, etc., which have no proper place in the prior proceedings for the adjudication of innocence or guilt.

In this case petitioners entered the January 19th hearing on the reasonable assumption that it would deal with their right to bail pending appeal, not a second trial of the issue of contempt. In a real sense, therefore, petitioners were without notice. Even if—indeed, particularly if—such a hearing, absent proper notice or opportunity to defend, resulted in incriminating proof, use of such proof was violative of due process.

> "On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be re-

spected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution." *Chessman* v. *Teets*, 356 U. S. 156, 165.

CONCLUSION

A writ of certiorari to the District Court of Appeal of Florida, First District, and the Supreme Court of Florida should be granted.

Respectfully submitted,

MURRAY A. GORDON
401 Broadway
New York, New York

JEROME J. BORNSTEIN
125 S. Court Avenue
Orlando, Florida

Attorneys for Petitioners

June 1968